UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

and

STATE OF MINNESOTA, by its Attorney General Hubert H. Humphrey, III, its Department of Health, and its Pollution Control Agency,

Plaintiff-Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORATION; HOUSING AND REDEVELOPMENT AUTHORITY OF ST. LOUIS PARK; OAK PARK VILLAGE ASSOCIATES; RUSTIC OAKS CONDOMINIUM, INC.; and PHILIP'S INVESTMENT CO.,

Defendants,

and

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORATION,

Defendant,

and

CITY OF HOPKINS,

Plaintiff-Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

Civil No. 4-80-469

MEMORANDUM OF REILLY TAR & CHEMICAL CORPORATION IN OPPOSITION TO THE UNITED STATES' AND STATE OF MINNESOTA'S JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANT REILLY TAR & CHEMICAL CORPORATION'S FOURTH AFFIRMATIVE DEFENSE TO THE UNITED STATES' COMPLAINT AND FIFTH AFFIRMATIVE DEFENSE TO THE STATE'S COMPLAINT (UNCONSTITUTIONALITY OF OF CERCLA AS APPLIED)

## INTRODUCTION

This memorandum is submitted in opposition to the joint motion of plaintiffs United States and the State of Minnesota ("State") for partial summary judgment on defendant Reilly Tar & Chemical Corporation's ("Reilly") Fourth Affirmative Defense to the United States' amended complaint and Fifth Affirmative Defense to the State's amended complaint. In pertinent part, these defenses assert that the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. Sections 9061 et seq., upon which the State and the United States rely in part in their claims for relief, violates the Due Process Clause of the Fifth Amendment to the Constitution of the United States as it is applied by those plaintiffs to the facts of this case in an attempt to hold Reilly liable thereunder.[1/]

In an attempt to downplay the constitutional challenge raised by Reilly to this retroactive application of the statute, the United States and the State first attempt to

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1/ Reilly, in the aforementioned defenses, has also asserted that the Resource Conservation and Recovery Act of 1976, as amended, upon which plaintiffs also rely, also violates the Due Process Clause insofar as it is applied to the facts of this case in an attempt to hold Reilly liable thereunder. The joint motion of the United States and the State does not, however, seek summary judgment as to this aspect of the aforementioned defenses. Nor does the current motion involve similar defenses raised as against the use of CERCLA by plaintiffs City of St. Louis Park or City of Hopkins.

convince the Court that CERCLA, enacted specifically to fill the gap left in existing law by RCRA'S failure to cover past practices, is somehow not in fact being applied here retroactively. They assert this although, through its application here, they are attempting to hold strictly liable a former owner of an inactive site who razed its plant and sold the premises to a responsible governmental party years before the passage of the Act, so that all conduct of that former owner, Reilly, took place long before the Act's passage. They assert this even though the regulatory standards which they are attempting to enforce in order to require remedial action were also non-existent prior to 1980. Then, perhaps recognizing the weakness of such an argument under the facts of this case, the United States and the State go on to argue essentially that, even if the law is retrospective, Reilly's constitutional challenge to the application of CERCLA to Reilly under the facts of this case is no more than a garden variety challenge to economic legislation, subject to no more of a test than would be a statute designed to regulate the licensing of optometrists. Cf. Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (cited by plaintiffs).

The plain fact of the matter, however, is that the State's and the United States' attempts here to hold Reilly liable by applying CERCLA and 1980 regulations and criteria to these facts can only be called retroactive under any realistic

definition of that term. And the Due Process Clause of the United States Constitution does provide companies situated as is Reilly here with protection from such retroactive liability. That protection is not as ephemeral as the United States and the State would have the Court believe. It requires this Court not only to look at the law whose application is being challenged, but also to assess the application of that law to the particular facts of this case. Reilly submits that, because of the substantial factual determinations required, the motion for summary judgment now is inappropriate, and a resolution of the factual questions raised must be made at trial before the constitutional question can properly be determined.

## STATEMENT OF FACTS

In this case, as more fully disclosed by the Lesher, Schwartzbauer, McMichael and Craun affidavits submitted herewith, the evidence presented to the court at trial will show that Reilly's activities were not only regarded as totally benign at the time, but also that the coal tar and creosote industries were and are important to society. Reilly is a company which operates four coal tar refineries in various states. In addition, a major part of its business activities today consist of the manufacture and sale of products which are derived from a substance known as pyridine, which in its

natural form is an element of coal tar. It was through basic research on coal tar and its uses that Reilly developed gamma picoline, which was later converted into isonicotinic acid and became the cure for tuberculosis. Reilly today remains the sole manufacturer of this chemical (Edwards dep. 196:22-198:20, attached as Exhibit D to the Schwartzbauer affidavit). That same basic research also led to the development of alpha picoline which Reilly's research labs converted into 2-vinyl pyridine. It was learned in about 1940 that vinyl picoline reacted chemically so as to bond with rayon cord and make possible the production of synthetic automobile tires at the outbreak of World War II, when the Japanese cut off the United States' supply of natural rubber from the Far East (Id. at 198:21-200:11). The beta picoline that was produced from pyridine was also converted into niacin and niacinamide which are B-1 vitamins (Edwards dep. at 200:12-200:25). The huge demand which resulted for natural pyridine derived from coal tar led Reilly to search for and discover a method of synthesizing pyridine, so that today the pyridine industry is as large as the coal tar industry (Id. at 201:4-202:5). Today, Reilly and other manufacturers of pyridine supply it as a solvent used in the manufacture of pharmaceuticals. All of these had their beginnings in basic coal tar research done by the defendant in this case (Id. at 201:4-202:20).

From 1917 to 1972 one of Reilly's coal tar refineries and wood treating plants was located at St. Louis Park, Minnesota in an industrial zone near the intersection of Highway 7 and Lake Street. The raw materials used and products made at the St. Louis Park plant were all derived from natural coal tar.

Reilly's method of operations is described in the Lesher affidavit (pp. 3-5) to which the Court is respectfully referred. Briefly, however, coal tar is refined by heating it in a still. As it is heated, various grades of oils are boiled off, then cooled and condensed back to liquid products. Some of these liquids are blended and made into various grades of creosote oil. Depending upon how much oil is removed, the residue left in the still is used as road tar, or as coal tar pitch, or coke. Eventually all of the raw material used in a coal tar refinery is converted into useful products. There are no major waste materials produced.

Road tar was used extensively in St. Louis Park and elsewhere in Minnesota for surfacing streets and highways prior to use of bituminous asphalt and concrete in recent decades. See Mootz dep. at 220-222, attached as Exhibit H to Schwartzbauer affidavit. Coal tar is also used for the manufacture of coal tar enamel, which is widely used for external and internal protection in pipes and tanks for a variety of uses, including drinking water distribution

systems. Coal tar is also used in certain medicinal applications. See Lesher affidavit at 16.

Creosote oil is used for preserving wood against decay. It is applied to railroad ties, utility poles and pilings. Thus, it serves to conserve the country's forests, which would otherwise be more quickly depleted in an attempt to supply the demand for timber. These uses of creosote oil have involved the widespread placement of treated lumber on or into the ground, apparently without adverse environmental or public health consequences. See Lesher affidavit at 16-17.

Over the fifty-five years during which Reilly's St. Louis Park plant operated, residues of coal tar and creosote oil were deposited on the ground because of leaks from pipes, pumps, and other mechanical devices necessary to the plant's operation and probably from other minor spills. In addition, since the City of St. Louis Park did not have a public sewer system in 1917, a swamp, or bog, immediately south of the plant became the ultimate resting place for the plant's wastewater, which contained minute quantities of coal tar, creosote oil, and related chemicals. This waste was generated from several plant sources, including water present in the coal tar, which was distilled in the coal-tar refining process, and then cooled by passing it around cooling coils, allowed to settle in a tank in order to recover most of the light oil still in this water, and then discharged. In 1940, the plant's

wastewater treatment was improved by the addition of an oil/water separator downstream from the settling tank. See Lesher affidavit at 5. The separator, like the settling tank, operated on the principle of gravity separation; that is, oils heavier than water settle to the bottom and oils lighter than water float to the top, where they are removed by wooden baffles. Wastewater also was treated in this separator from other plant operations, such as boiler blowdown and wood treating cylinder waste. See Finch dep. at 137-148, attached as Exhibit E to the Schwartzbauer affidavit.

Further improvements were made in 1941, when a phenol extraction system was installed, and in 1951, when a straw filter was added downstream of the settling basin. See Hennessy dep. at 175-176, attached as Exhibit J to the Schwartzbauer affidavit; Horner dep. at 79-80, 458, attached as Exhibit F to the Schwartzbauer affidavit. In 1968, another straw filter was added in the plant's drainage ditch at the point where the wastewater left the property. See Lesher affidavit at 13. These improvements were installed in order to improve the efficiency of the removal of oils and phenols.

Plant records document the fact that Reilly negotiated with the City of St. Louis Park in the 1960's concerning possible discharge of its waste into the city sewer. However, such connections were never made. Plant records and photographs, as well as deposition testimony, (see Finch dep.

79-91, attached as Exhibit E to the Schwartzbauer affidavit) also document that waste releases from the plant property and into the bog were increased because runoff water from nearby city streets was channeled by the City through culverts and onto plant property.

The bog into which Reilly's wastewater was discharged was located in the midst of St. Louis Park's heaviest industrial area. It is a low point in an area which has been occupied by other chemical plants, rubber companies, plywood companies, and other industries. See Lesher affidavit at 15. Prior to 1905, the Reilly plant site was occupied by the Minnesota Beet Sugar Manufacturing Company. The sugar beet refinery also discharged wastewater into the bog.

Over a large part of the plant's history (since 1932) a dispute existed between Reilly and the City (the Village) of St. Louis Park and the State of Minnesota concerning whether a phenolic or swampy taste attributed to a city well south of the plant should be blamed on Reilly or on other sources, such as the peat which is common in the area. This dispute and other complaints resulted in a lawsuit begun in 1970 by the City and the Minnesota Pollution Control Agency. The lawsuit was concluded in 1972 and 1973 by virtue of the sale of the property by Reilly to the City. However, the State of Minnesota declined to deliver a dismissal of the litigation when requested to do so by St. Louis Park in 1973, and the City

at that time entered into an agreement with Reilly to be responsible for "any and all questions of soil and water impurities." For a more complete recitation of the events concerning this litigation, we respectfully refer the Court to Reilly's Memorandum dated June 24, 1983 in Opposition to the State's Motion for Summary Judgment on Reilly's First Affirmative Defense and Reilly's Petition for Writ of Mandamus dated October 30, 1983.

During the period of the plant's operations, the fact that tar and creosote oil dripped on and accumulated in the ground and the fact that the wastewater, which contained very small quantities of coal tar or creosote, was released to a swamp south of the premises, was obviously not a matter for concern. Given the fact that coal comes from the ground, and that most uses of coal tar and creosote oil for 150 years involved deliberately placing it on the ground, it was impossible to perceive of that additional disposal on the ground as in any way harmful. This important point is explained in more detail in the Lesher affidavit and in subsequent pages of this brief. See also Horner dep. at 472-473, attached as Exhibit F to Schwartzbauer affidavit.

The testimony will show a sharp conflict concerning whether creosote or coal tar is harmful to health, and whether any remedy other than monitoring the levels of polynuclear aromatic hydrocarbons (PAH) is needed in St. Louis Park.

Briefly, PAH is a class of substances which is widespread in the environment. They are created by both slow and rapid combustion and pyrolysis. They occur throughout the environment because of both natural and human activities. They are found in coal, coal tar, creosote oil, and petroleum, because coal and oil are formed over millions of years as decayed animal and vegetable matter undergoes compaction and thermal processes. Accordingly, PAH are also found in peat and other organic soils, as well as in many types of vegetation. PAH are found in treated and untreated public drinking water supplies of many communities in the United States and throughout the world. See Schwartzbauer affidavit and attached exhibits. The anticipated evidence concerning whether coal tar or creosote are presently, or were considered as a health hazard, will be discussed in greater detail subsequently.

## ARGUMENT

### I.

Given the fact that everything that Reilly has done in the State of Minnesota was done prior to 1973, it is not for Reilly, against whom liability under this statute is being asserted, to show that it was intended to be retroactive in nature. Indeed, plaintiffs do not, as they could not, take the

position that it was not intended to be retroactive.[2/] They merely wish this Court to call it prospective in application simply because it deals in part with present conditions, conditions over which Reilly has no control and has had none since long before the Act was passed.

But saying it does not make it so, and it is quite clear that any liability under the statute with which the United States and the State seek to charge Reilly necessarily depends on facts and conduct which wholly predate the passage of either RCRA or CERCLA. Reilly not only ceased operations years before either Act; it turned over all right, title, and responsibility for its former property and "any and all questions of soil and water impurities" and restoration to a responsible governmental party. To seek to hold Reilly liable now, following the history of this case, for alleged soil and groundwater pollution can only be said to be retroactive in nature in any meaningful sense of the term. Surely, if the Due Process Clause's protection against retrospective legislation is to have any meaning, it must be applicable here.

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2/ It is true that, in one respect, no retroactivity was intended by Congress. As the court held in United States v. Northeastern Pharmaceutical & Chemical Co., No. 80-5066-CV-5-4 (W.D. Mo. Jan 31, 1984) (slip op. attached to plaintiffs' memorandum), upon which plaintiffs rely, CERCLA defendants may not be held liable for pre-CERCLA response costs, i.e., response costs incurred prior to the enactment of CERCLA on December 11, 1980. Slip op. at 29.

In support of their attempt to dissuade this Court from considering the merits of the Due Process challenge which Reilly has raised, plaintiffs refer to the recent ruling in United States v. South Carolina Recycling and Disposal, Inc., No. 80-1274-6 (D.S.C. Feb. 21, 1984) ("SCRDI") (slip op. attached to plaintiffs' memorandum). Reilly submits, first of all, that the SCRDI ruling is simply, and demonstrably, incorrect.

Although the position argued by the plaintiffs here was adopted by the SCRDI court, other courts have recognized what one would think is the obvious: that CERCLA was intended to, and in fact does, impose liability in a retroactive manner. See, e.g., United States v. Northeastern Pharmaceutical and Chemical Co., No. 80-5066-Cv-S-4 (W.D. Mo. Jan. 31, 1984) ("NEPACCO") (slip op. attached to plaintiffs' memorandum), slip op. at 22-23; Ohio v. Georgeoff, 562 F. Supp. 1300 (N.D. Ohio 1983). The Georgeoff court in fact specifically rejected the strained semantic argument made by plaintiffs here and ruled that CERCLA liability is retroactive in nature. The Georgeoff court observed "that a statute will not require a retroactive application because it draws upon antecedent facts for its operation, but it may not impose liability based solely upon considerations already past without applying retroactively." 562 F. Supp. at 1303. It properly distinguished the cases cited by plaintiffs, both here and

before the Georgeoff and SCRDI courts, by noting that the holding of non-retroactively in each involved at least some form of conduct occuring after the date of the statute's enactment. See 562 F. Supp. at 1303-1305. For example, in Chicago & Alton Railroad Company v. Tranbarger, 238 U.S. 67 (1915), upon which plaintiffs rely, a statute required that there be an outlet for running water in bridge embankments. Plaintiffs, who had built a bridge without such an outlet three months before the passage of the statute, asserted a challenge based on retroactivity. The Supreme Court held that the statute was not applied retroactively because the violation was not solely based on conduct "done or omitted before the passage of the Act... but because after that time it maintained the embankment in a manner prohibited by that Act." 238 U.S. at 73 (emphasis added). Similarly, the Georgeoff court rejected the plaintiff's reference to a RCRA § 7003 case, United States v. Diamond Shamrock Corp., 17 E.R.C. 1329 (N.D. Ohio, May 29, 1981) (cited by and attached to plaintiffs' memorandum), in support of their proposition, observing that "[b]ecause Diamond Shamrock retained control of the dump after the date of the statute's passage, liability could be premised upon continuing to maintain the dump in an improper condition." Ohio v. Georgeoff, supra, 562 F. Supp. at 1304.[3/] The court

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3/ The two other RCRA Section 7003 decisions cited by plaintiffs here in support of their argument on this point

dismissed the argument by saying "[t]here is no authority for finding that an imposition of statutory liability premised solely upon past acts does not require retroactive application of the statute." 562 F. Supp. at 1304.[4/]

This Court should reject the argument as well; indeed, even if SCRDI were somehow correct as to CERCLA in the abstract, its conclusion must be rejected under the facts of this case. Reilly had absolutely no right, title, or control

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3/ (Footnote Continued)

(see plaintiffs' memorandum at 17) are similarly inapposite. In United States v. Solvents Recovery Service of New England, 496 F. Supp. 1127 (D. Conn. 1980), the court had ruled that Section 7003 was jurisdictional only and not substantive in nature; thus it felt no retroactivity question was raised. 496 F. Supp. at 1141-2. Moreover, it had also noted that active disposal at the site after the passage of RCRA had been alleged. 496 F. Supp. at 1141. In United States v. Price, 523 F. Supp. 1055 (D.N.J. 1981), aff'd on other grounds, 688 F.2d 204 (3d Cir. 1982), the former owner defendants had continued to own the dump site after the enactment of RCRA.

Similarly, in Commonwealth v. Barnes & Tucker Co., 23 Pa. Commw. 496, 319 A.2d 871 (Pa. Sup. Ct. 1974), aff'd 472 Pa. 115, 371 A.2d 461, appeal dismissed sub nom.Barnes & Tucker Co. v. Pennsylvania, 434 U.S. 807 (1977), which plaintiffs also cite in support of this argument, the mine owners involved in the past acts creating a nuisance were also the owners of the mine before and after the new law sought to be applied to abate that nuisance was enacted.

4/ The Georgeoff court also rejected an argument made by the United States in that case that CERCLA should not be considered as applying retroactively because it was only remedial in nature and did not impose new liabilities. See Ohio v. Georgeoff, supra, 562 F. Supp. at 1306 n. 7. The United States and the State do not assert that argument here.

over the property after June 19, 1973. It engaged in no conduct whatsoever relative to the site after 1972. Any imposition of liability against it under CERCLA is and can only be based on its pre-CERCLA conduct. The CERCLA liability asserted against it can only be realistically viewed as retroactive in nature.[5/]

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5/ The plaintiffs' invitation for the Court to avoid the constitutional question by "construing" the statute as prospective rather than retroactive is thus, under the facts of this case, an invitation to construe the meaning out of the Due Process Clause insofar as any protection against retroactivity is concerned. However salutary the principle of constitutional decision-avoidance may be in general, the Supreme Court has itself recognized that it is "susceptible of misuse." Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 629 (1974). It is not a license with which to strain reality to reach improper constructions. No such construction may be adopted unless it is "reasonable" under the facts at hand. See Yu Cong Eng v. Trinidad, 271 U.S. 500, 518 (1926). Where, as here, the statutory meaning and intent are plain, the court is, in fact, "required to reject the . . . suggestion that [it] engage in a saving construction and avoid the constitutional issues. . . ." City of Rome v. United States, 446 U.S. 156, 173 (1980). See also Aptheker v. Secretary of State, 378 U.S. 500, 515 (1964); Jay v. Boyd, 351 U.S. 345, 357 n.21 (1956); Shapiro v. United States, 335 U.S. 1, 31 n.40 (1948); Washington State Dairy Products Commission v. United States, 685 F.2d 298, 302 (9th Cir. 1982). The principle of avoidance does not justify "a distortion of the congressional purpose, not even if the clearly correct purpose makes marked deviations from custom or leads inevitably to a holding of constitutional invalidity." United States v. Sullivan, 332 U.S. 689, 693 (1948). "[A]voidance of a difficulty will not be pressed to the point of disingenuous evasion." Hopkins Federal Savings & Loan Ass'n v. Cleary, 296 U.S. 315, 335 (1935), quoting Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933).

It should thus be clear that imposition of strict liability under CERCLA on a former owner of an inactive site which had been turned over to a responsible governmental party is sufficiently retroactive in nature to implicate constitutional concerns. Moreover, whatever label might be affixed to the statute as a whole, to the extent that there are any retroactive aspects to the liability sought to be imposed, these must be separately tested against specific due process considerations before imposition of such liability may pass constitutional muster. The Supreme Court clearly stated in the case upon which plaintiffs so heavily rely, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17 (1976), that "[t]he retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former."

II.

The question thus becomes what tests must retrospective aspects of legislation pass before they may constitutionally be applied.6/ That retroactive government

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6/ The United States and the State appear to argue in their brief that the standard is simply one of determining nothing more than that a rational basis for the legislation exists, and is thus no different from the tests applied to purely prospective legislation. (See plaintiffs' memorandum at 20-28). If there was in fact no difference, however, one might wonder why the plaintiffs have argued for categorization of this legislation as prospective

action is disfavored is among the fundamental notions inherent in our Constitution. In some instances, such action is absolutely and expressly prohibited.[7] In others, although tolerated as a general concept, such action is narrowly circumscribed by the Due Process Clause and related constitutional doctrines[8] to prevent the imposition of harsh and oppressive burdens on private parties.

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6/ (Footnote Continued)

rather than retroactive. Although misguided, that such an argument has even been made serves to highlight the fact that it does make a difference in the test to be applied when there are retrospective aspects of legislation involved in an attempt to assert liability.

7/ The Ex Post Facto Clause, Art. I, § 9, absolutely prohibits the creation of retroactive criminal or punitive actions.

8/ Although it is the Due Process Clause which is most directly implicated here, it is recognized that "the analysis employed in Contract Clause cases is also relevant to judicial scrutiny of Congressional enactments under the Due Process Clause." Nachman Corp. v. Pension Benefit Guaranty Corp., 592 F.2d 947, 959 (7th Cir. 1979), cert. granted limited to statutory issues and affirmed, 446 U.S. 359 (1980). See also Shelter Framing Corp. v. Pension Benefit Guaranty Corp., 705 F.2d 1502, 1509-1515 & n.12 (9th Cir. 1983), prob. juris. noted sub nom. Pension Benefit Guarantee Corp. v. R. A. Gray and Co., __ U.S. __, 104 S. Ct. 271 (1983); Northwestern National Life Ins. Co. v. Tahoe Regional Planning Agency, 632 F.2d 104, 106 (9th Cir. 1980); Fornaris v. Ridge Tool Co., 423 F.2d 563, 566-7 & n.8 (1st Cir. 1970), rev'd on other grounds, 400 U.S. 41 (1970); Coronet Dodge, Inc. v. Speckmann, 553 F. Supp. 518, 520 (E.D. Mo. 1982); Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960); Hale, The Supreme Court and the Contract Clause, 57 Harv. L. Rev. 852, 890-91 (1944).

Despite the arguments of the State and the United States to the contrary, "[r]etroactive measures . . . have traditionally been subjected to stricter scrutiny than have prospective measures." Daughters of Miriam Center for the Aged v. Mathews, 590 F.2d 1250, 1259 (3d Cir. 1978). See Usery V. Turner Elkhorn Mining Co., supra, 428 U.S. at 16-17.[9/] The Supreme Court expressed its disfavor of retrospective legislation in Railroad Retirement Board v. Alton Railroad, 295 U.S. 330 (1935) (invalidating retroactive provision requiring pensions for former employees not employed at time of enactment),[10/] and it has in recent years continued to show

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9/ Plaintiffs refer to Turner Elkhorn for the proposition that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations, even though the effect of the legislation is to impose a new duty or liability based on past acts. Cf. plaintiffs' memorandum at 20. The Turner Elkhorn Court went on from there, however, to state that:

> It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.

428 U.S. at 16-17.

10/ See also Coolidge v. Long, 282 U.S. 582 (1931); Untermeyer v. Anderson, 276 U.S. 440, 445 (1928); Nichols v. Coolidge, 274 U.S. 531, 542 (1927) (all invalidating retroactive taxation of gifts completed before enactment of the taxing statute); and Blodgett v. Holden, 275 U.S. 142, 147 (1927) (same but court equally divided between statutory and constitutional grounds).

its reluctance to permit retroactive government action at the expense of private parties. See, e.g., United States v. Security Industrial Bank, 459 U.S. 70 (1982) (where substantial doubts that retroactive destruction of liens would comport with Fifth Amendment, provision of bankruptcy law construed so as to avoid destruction of pre-enactment property rights); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (invalidating application of state law which retroactively modified the compensation a company had agreed to pay its employees in years past by retroactively changing company's pension plan obigations); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (invalidating retroactive repeal of bond covenant). See also White Motor Corp. v. Malone, 599 F.2d 283 (8th Cir.), aff'd, 444 U.S. 911 (1979) (invalidating application of state law on same basis as Spannaus, supra).

Where, under the facts of a given case, the consequences of the retroactive application of civil litigation would be particularly harsh and oppressive, the Due Process Clause may be invoked against that application. See, e.g., United States Trust Co. v. New Jersey, supra, 431 U.S. at 17 n. 13; Welch v. Henry, 305 U.S. 134, 147 (1938). Courts compare closely "the public interest in the retroactive rule with the private interests that are overturned." Daughters of Miriam Center for the Aged v. Mathews, supra, 590 F.2d at 1260. Thus, even if a sufficient constitutional justification can be

established for acting retroactively, that justification must be balanced against the nature and extent of the burdens caused by making prior conduct retroactively liable, and this must be done on the basis of the facts of the case at hand. Determinations such as this, amounting to a decision as to when justice and fairness prevent the government from imposing harsh or oppressive burdens on one or a few which should be shared more broadly or borne by the government at large, are necessarily "ad hoc, factual inquiries." See Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

In Usery v. Turner Elkhorn Mining Co., supra, 428 U.S. 1, the Court articulated some of the factors which must be weighed by any court confronted with a challenge to the constitutionality of a law being retrospectively applied. A review of them both distinguishes the holding of Turner Elkhorn from the case at hand and shows that, under the facts of this case, liability under CERCLA may not constitutionally be applied.[11/]

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11/ Reilly submits that the rulings in SCRDI and NEPACCO regarding the constitutionality of CERCLA are both incorrect and inapplicable to the "as applied" challenge made by Reilly here. Both decisions look principally to the cost spreading justification which satisfied the facial challenge before the Turner Elkhorn Court and do not adequately address the several factors which Turner Elkhorn itself states must be weighed in any "as applied" challenge. (Indeed, it is not at all clear from the opinions in SCRDI and NEPACCO that at least some forms of

To begin with, it is clear that rational basis justifications for prospective aspects of the legislation are not in and of themselves sufficient to justify retrospective aspects. Usery v. Turner Elkhorn Mining Co., supra, 428 U.S. at 16-17. For example, a valid congressional purpose which might justify Congress' decision to impose a prospective tax on the products of the chemical industry to produce a fund to finance government run clean-ups of abandoned hazardous waste sites is not itself sufficient to justify the retrospective imposition of liability on a particular former owner for the clean up of a particular abandoned site. The Turner Elkhorn Court itself recognized that any justification for the retrospective imposition of such liability must also pass other tests as well. 428 U.S. at 17.

In Turner Elkhorn, the Court articulated some of these test factors which must be weighed in any "as applied" challenge, even though the case before it raised only a facial

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11/ (Footnote Continued)

conduct, such as ownership, leasehold, or a continued contractual relationship, on the part of at least some defendants did not continue after the enactment of CERCLA. In the instant case, it is quite clear that Reilly engaged in no form of conduct relative to the site after June 19, 1973.) Moreover, challenges to the constitutionality of statutes as applied necessarily turn on the facts of each case, and, of course, neither the SCRDI nor NEPACCO court was confronted with the facts of this case, under which, Reilly submits, application of retroactive CERCLA liability to Reilly is constitutionally infirm.

challenge to the statute. One of these factors concerns the degree to which the party sought to be held retrospectively liable can be said to have known of the harm which the legislation sought to be applied retroactively now seeks to prevent. 428 U.S. at 17. Necessarily, this factor depends on the facts of each particular case. In this case, the facts show that Reilly cannot be said to have known that its conduct was harmful to human health, or even that what it was dealing with was a "hazardous" waste. See discussion below. See also Horner dep. at 85, attached as Exhibit F to the Schwartzbauer affidavit; Hennessy dep. at 212-215, attached as Exhibit J to the Schwartzbauer affidavit.

Reilly's evidence will show that while there has been a long history of investigation within the scientific community as to whether there is a connection between exposure to coal tar and some forms of cancer, the overwhelming evidence, even today, is that there is not. Indeed, as early as 1775, Percival Pott, an English scientist, postulated that there was a significantly high incidence of scrotal cancer among chimney sweeps. In addition, PAH was one of the earliest class of chemicals isolated as an elicitor of tumors in rodents when applied to the skin. However, there is a vast difference between animal carcinogenicity and human carcinogenicity. There is also a vast difference between experimental carcinogenicity of a single chemical in a laboratory setting

and actual carcinogencity of the entire product. There is substantial evidence, both experimental and epidemiologic, that current levels of exposure to coal tar and its products may be enhancing natural defenses for cancer prevention - yes, that coal tar is indeed good for us. See Schwartzbauer affidavit at ¶6.

The evidence will show that there are differences between respected scientists as to whether there are occupational hazards in the coal by-products industries associated with certain forms of cancer. However, cancers of the skin have not been occupational hazards in the coal tar, creosote or coal by-products industries in current decades, despite the increased production and use of coal distillates and in spite of an eager search for such associations. In addition, coal tar, creosote and coal by-products workers are also characterized by an absence of an occupational lung cancer hazard in the past quarter of a century. See Schwartzbauer affidavit at ¶6; Lesher affidavit at 17-18.

The evidence will, of course, be very complex. The demands upon the Court in resolving disputed contentions of the parties concerning the existence or non-existence of a health risk will be high. The early Minnesota Department of Health reports prepared with respect to the St. Louis Park situation will be shown to contain serious errors. Reilly's consultants will explain to the Court that it is important to distinguish

between carcinogenic and noncarcinogenic PAH and also to distinguish between exposure to a single PAH and exposure to a complex mixture since the individual PAHs in the mixture may compete with one another. The mixture may in fact be anti-carcinogenic, even though one or more of the substances may be classified as carcinogenic. See Schwartzbauer affidavit at ¶6.

Given the apparent differences between the parties at the present time concerning the existence of a health risk related to coal tar or creosote, it is obvious that there was no realization on Reilly's part, or on the part of the industry as a whole, of such a health risk. See Lesher affidavit, pp. 15-18. Even today, creosote and coal tar, as such, are not classified as hazardous by the regulations, although waste sludges, which may have been deposited on the surface of the ground at the plant site (but have long since been removed by the City of St. Louis Park) are now classified as hazardous.

Moreover, the regulations promulgated by the EPA which classify these waste sludges as hazardous, 40 C.F.R. §261.32, were not promulgated until February 26, 1980, to be effective August 26, 1980. 45 Fed. Reg. 12724 (1980). Prior to that, there was no law or regulation, state or federal, which classified creosote wastes as hazardous. Perhaps even more important, although health scientists have theorized for years regarding the question whether it is desirable to minimize PAH

exposures, the EPA did not, until 1980, suggest to state and local governments any criteria for PAH in ambient waters. See Lesher affidavit at 18-22. The Lesher affidavit shows that Reilly did respond to the requirements of the City and the State over the decades that this dispute has been with us.[12/] However, now, in litigation commenced in 1980, relying upon 1980 legislation, 1980 regulations, 1980 criteria, and 1980 societal views concerning the emphasis that should be placed upon the avoidance of carcinogens, the city, state and federal governments contend that what Reilly did was not good enough. It is contended that Reilly should now undo that which was done by Reilly with the aquiescence and blessing of the responsible governmental authorities.

This case, then, is not like the case of a chemical company which buried its dioxin in metal barrels, knowing that dioxin is dangerous (why else would it be buried rather than poured into the local sewer?), knowing that barrels do rust out, and that chemicals can spread to water supplies. This is a case involving a socially desirable industry which, when it

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12/ The deposition testimony and exhibits have shown already that Reilly's Dr. Wheeler, Mr. Mitchell and Mr. Horner tried to ascertain what the State and City requirements for releases of phenol were in the 1940's and later. However, the State and City would not commit themselves. See Horner dep. at 452-457, attached as Exhibit F to the Schwartzbauer affidavit; See also RTC Ex 60, attached as Exhibit I to the Schwartzbauer affidavit. Reilly did its best, however, to comply with whatever was required.

was built, was located in an appropriate place, but which was later surrounded by a community which did not like the smoke, or the smell, or the oily substance left on the ground. The evidence will show that this is not a case involving some sudden or remarkable breakthrough in medical science. The major changes have not been in science, but in society and politics. However, the science of measurement has changed dramatically. Today, in this litigation, the plaintiffs are seeking to enforce a remedy which will ensure that total "carcinogenic" PAH in the St. Louis Park water supply will not exceed 28 parts per trillion, and that total "noncarconogenic" PAH will not exceed 280 parts per trillion. See Lesher affidavit at 18-20. Reilly will submit that while society may want to adopt that very cautious and conservative criteria for the future, that criteria cannot retroactively be applied to Reilly's activities because prior to 1970 science could not measure at parts per trillion levels. See Lesher affidavit at 18-20.

Another factor which must be taken into account, even if the party to be charged did know of the harm, is whether it can be said that that party would have taken steps to reduce or eliminate the harm had the law now sought to be imposed been in effect at the time. See Usery v. Turner Elkhorn Mining Co., supra, 428 U.S. at 17. While it would of course be easy simply to say now that yes, one would have done things differently if

the law had been in effect then, a look at what safety steps were taken and what responses were made when concerns were raised provides the factual showing necessary to support such assertions in this context. Cf. Usery v. Turner Elkhorn Mining Co., supra, 428 U.S. at 45 (Powell, J., concurring in part and concurring in the judgment in part). Here, the facts show that Reilly had waste stream facilities as good or better than others in the industry and that it took affirmative action to improve them when environmental concerns were raised. See joint affidavit of Francis T. McMichael and John C. Craun, and Lesher affidavit at 11-14. Had today's requirements been in effect prior to 1972, Reilly's corporate practices followed nationwide would have required the installation of measures to comply with those requirements. See Lesher affidavit at 20-22.

Along these lines, it is important to remember the manner in which Reilly terminated both its operations at the St. Louis Park site and its control over the property. Reilly did not simply abandon the property or sell it to an irresponsible, insolvent party unconcerned with environmental matters. In fact, Reilly sold it to a governmental entity, the City of St. Louis Park, which had demonstrated its concern for environmental matters and was fiscally responsible. Reilly sold it to the very party whom the State (and, of course, the City) wished to have take over the property, and Reilly made sure that, as part of the sale, that party specifically avowed

in the purchase agreement that it was taking over responsibility for all aspects of the property, including "any and all questions of soil and water impurities." See Purchase Agreement, par. 4, attached as Exhibit P to Lesher affidavit. Reilly then dismantled its plant in a manner agreed upon by the City. See Purchase Agreement, par. 5, attached as Exhibit D to Lesher affidavit and RTC Ex. 158, attached as Exhibit G to Schwartzbauer affidavit. Indeed, it was the City who gave the final approval of the completed demolition to the contractor. See RTC Ex. 158, attached as Exhibit G to Schwartzbauer affidavit.

Thus, Reilly left the site in good hands, hands with which the governments involved were satisfied. The City assumed full control over the property, and, when the State later balked at issuing a formal dismissal of the lawsuit because the City had not yet come up with a restoration plan which was to the State's liking, the City, with the full knowledge of the State, formally finished its acquisition of the property from Reilly by telling Reilly not to worry, that it, the City, would hold Reilly harmless from any restoration of the site that the State might require. See Exhibit R to Lescher affidavit.

The City, with full knowledge of and cooperation of the State, thus asked Reilly to leave, to sell its property, and to turn over to it full control of the property and

responsibility for "any and all questions of soil and water impurities." Yet the plaintiffs now argue it does not violate due process to attempt nonetheless to make Reilly retroactively liable. These factors weigh heavily in Reilly's favor against the retroactive imposition of liability here, and their importance is emphasized by the rule that retroactive liability is to be all the more carefully scrutinized when a governmental entity stands to benefit from such an application. See Allied Structural Steel Co. v. Spannaus, supra, 438 U.S. at 244 & n. 15; United States Trust Co. v. New Jersey, supra, 431 U.S. at 26.

There are several other factors which both distinguish the instant case from Turner Elkhorn and show the due process violation which would result from holding Reilly liable under CERCLA here. The Turner Elkhorn Court stated that, even in a situation where harm was known and past conduct had been less than exemplary, "we would nevertheless hesitate to approve the retrospective imposition of liability on any theory of deterrence ... or blameworthiness." 428 U.S. at 17-18. In Turner Elkhorn, the Court found that those elements were absent. Thus, it found that that liability could be retroactively asserted because of the justification that it was intended to spread the costs of employees' disabilities "to those who have profited from the fruits of their labor-the operators and the coal consumers." 428 U.S. at 18. Here,

however, it is clear that the objectives of the retrospective aspects of the legislation are both deterrence and liability on the basis of blameworthiness.

As the government plaintiffs have themselves explained it in their brief, the congressional purpose behind CERCLA was not simply to spread the costs of cleaning up inactive plant sites among the producers and consumers who profitted from their products. Rather, there is a distinct element of "blameworthiness" involved. As the plaintiffs themselves conclude, the legislative history indicates that the intent was "that those responsible for any damage . . . should bear the costs of their actions." (See plaintiffs' memorandum at 9).

Moreover, this Court itself articulated the theory of blameworthiness behind the liability provisions when, in a previous opinion in this case, after reviewing the legislative history of CERCLA, it concluded that "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created." United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982). Reilly submits that, whether or not the industry-wide tax to fund government clean-ups is based on a rationale of spreading costs to consumers and producers,[13/]

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13/ Regardless of the justification for CERCLA generally, the specific retroactive imposition of liability here must have

and is thus comparable to the social legislation held constitutional in Turner Elkhorn, the liability provisions are based on a rationale of blameworthiness, and, as such, are constitutionally infirm when retroactively applied.

Similarly, this Court itself has recognized that there is a theory of deterrence behind these environmental statutes. In its earlier opinion, the Court quoted extensively from the decision in United States v. Price, 523 F. Supp. 1055, 1072-73 (D.N.J. 1981) aff'd on other grounds, 688 F.2d 204 (3d Cir. 1982), a RCRA § 7003 case, including the following passage: "More importantly, society's interests in deterring the improper disposal of hazardous wastes . . . mandate that those responsible for the disposal of such wastes not be able to shirk their statutory responsibilities. . . ." See 546 F. Supp. at 1108. Reilly submits that, as intimated by the Court in Turner Elkhorn, to the extent that provisions of CERCLA, such as the liability provisions, are based as theories of deterrence or blameworthiness, they may not constitutionally be applied retroactively.

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13/ (Footnote Continued)

its own, constitutionally satisfactory, justification. See, e.g., Shelter Framing Corp. v. Pension Benefit Guaranty Corp., supra, 705 F.2d at 1514; Garris v. Hanover Insurance Co., 630 F.2d 1001, 1008 (4th Cir. 1980) (the constitutional "question is properly referable solely to the private enforcement provision" that would be applied retroactively).

To single Reilly out as a "responsible party" not only for response costs, but also for damages to be recovered by the State and the City is more closely akin to a tort action against Reilly than to a legislative spreading of the costs. We recognize that liability under CERCLA § 107 is strict, and requires no proof of negligence or unreasonableness. However, what is this other than an assumption by Congress that in most cases, the burial or release of a hazardous waste to the environment was socially undesirable? Otherwise, why the repeated Congressional and judicial references to "chemical poisons" and "improper disposal"? Obviously, Congress thought it was responding rationally to a serious public health problem. In general, and with respect to such sites as chemical waste dumps which were uppermost among Congressional objectives in enacting CERCLA,[14/] the Court may want to

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14/ See, e.g., H.R. Rep. No. 96-1016 Part I, 96th Cong., 2d Sess. 18-20, reprinted in 1980 U.S. Code Cong. and Admin. News 6119, 6121-2. Reilly does not contend that its activities in St. Louis Park are outside the broad language of the statute, as a matter of statutory interpretation. Nor does it contend that the cleanup of chemical dumps was the sole objective of the statute. However, the legislative history contains frequent references to "chemical spills," "dumpsites," "new toxic chemicals," "man-made chemicals," "synthetic chemicals," "illicit dumping," "dumpsites," "waste disposal sites," "waste haulers," "chemical waste dumps," etc. It contains some, but very few, references to the operation of manufacturing facilities. See, e.g., S. Rep. No. 96-848, 96th Cong., 2d Sess. 1-12 (1980). Moreover, although this history discloses that Congress considered the question whether an industry-wide fee, or tax, could be passed on to consumers, Id. at 19-22, there was obviously no consideration at all whether the costs of a cleanup could be passed on in the peculiar context of this case.

presume that the Congressional purpose was rational. But to apply the Act in this case, where the facts involve a benign and socially desirable industry whose activities were not considered dangerous at the time, is an entirely different matter.

As indicated by the Lesher affidavit, creosote is widely used as a wood preservative, and for that use is a registered pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The implications of that are important, since a chemical may not be registered unless the Environmental Protection Agency (EPA), one of the plaintiffs here, finds that the utility of a product outweighs its hazards. See FIFRA, 7 U.S.C. § 1362(c)(5). In finding that the continued use of creosote should be encouraged, the EPA concluded:

> The use of chemicals to extend the life and usefulness of wood and wood products is extremely important to agriculture and forestry. Durability of wood used in fence posts, animal holding pens, and outbuildings is a major concern to almost every American farmer and rancher. How long the life of wood and wood products can be extended greatly influences our ability to produce adequate supplies of timber and fiber from our forest lands. Pentachlorophenol (penta), which is widely used as a wood preservative, is effective against both bacteria and fungi as well as insects.
>
> In addition, its use in preventing sapstain that discolors lumber contributes substantially to the usefulness, acceptability, and beauty of most wood products. Primarily due to their cleanliness and paintability, the arsenical preservative compounds are being used more widely

> in lumber, timbers, and plywood. This trend is expected to increase with current concerns for aesthetics. Creosote and coal tar products have been used commercially as wood preservatives for over 150 years.
>
> Wood preservatives have made it economically possible to use wood in a wide variety of applications for which it would be unsuitable without treatment. Without wood preservatives, the cost of replacing electric power poles, forest protection facilities, bridges, marine pilings, railroad ties, and other such wood products would make it much more difficult to remain competitive in local and world markets.

EPA-USDA Technical Bulletin No. 1658-I, Cooperative Impact Assessment Report - The Biological and Economic Assessment of Pentachlorophenol, Inorganic Arsenicals, Creosote at ii (1981). The EPA (and the United States Department of Agriculture, in conjunction with the State Land - Grant Universities) has also concluded:

> The very fact that creosote has been widely used commercially as a preservative in wood products for 125 years with little or no evidence of adverse health or environmental effects strongly indicates that its effects on man and his environment are minimal at worst. There are, for example, 1 billion crossties treated with creosote in the United States that collectively contain approximately 30 billion pounds of creosote or one of its solutions (Howe and Koch, 1976). It is reasonable to suppose that, because of the opportunity for exposure of animal life, including man, to a product of such wide distribution, evidence of adverse health or environmental effects would have surfaced long ago. Id. at 222.

Given this honest appraisal of the real characteristics of the substances about which the EPA and the PCA complain in this lawsuit, we submit that the Court should take extreme care

before applying CERCLA to the facts of this case. For the present, however, it is our intent merely to emphasize that CERCLA may well be constitutional in some other applications. It may be constitutional insofar as it spreads the cost of waste cleanup to the chemical industry as a whole. It may also be constitutional if applied to the chemical waste dumps or other chemical spills which were uppermost among the Congressional objectives. It is quite a different matter to hold that it is constitutional as applied to a common industry, the hazards of which were not only unforeseeable, but also unmeasurable (see Lesher affidavit p. 18-20) and with respect to which substantial doubt of the hazard exists even today. See affidavit of Edward J. Schwartzbauer at ¶6.

Indeed, even to the extent that the retroactive imposition of liability on Reilly here is sought to be justitied under a Turner Elkhorn type rationale as an economic measure designed to spread out costs to those who benefitted from the past conduct at issue here -- that is, to Reilly and its customers - it fails to pass constitutional muster on this "justification" as well. Not only would it be difficult for economic reasons for Reilly to pass on an appropriate portion of these costs to customers who benefitted from prices which reflected the practices at the time,[15/] in the most relevant

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15/ As pointed out in the Lesher affidavit at page 23, the coal tar industry is highly competitive. A company engaged in

respects it would be impossible. Reilly is no longer in the business of treating wood, and such customers are no longer available to bear their proportionate share of the costs. Moreover, since its St. Louis Park plant is, and has long been, out of business, the local customers it served through that plant are also no longer available. Indeed, an especially compelling fact in this regard is the presence in this suit as plaintiffs -- pursuing CERCLA claims against Reilly -- of the City and the State. These two governmental entities -- and the City of Hopkins, another plaintiff with a CERCLA claim -- were substantial customers of Reilly's St. Louis Park plant, particularly of road surfacing materials.16/ Yet now these same governmental entities, who not only benefitted from the prices charged in connection with the practices of the past,

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15/ (Footnote Continued)

that business competes with other U.S. refiners and U.S. producers of other preservatives. In addition, it competes with refiners in Europe and the Far East, which do not have comparable legislation. Once again, American industry is placed at a competitive disadvantage by legislation which clearly has not considered these repercussions. In any event, this result should be contrasted with the industry-wide tax imposed by CERCLA and the industry-wide administrative liability scheme upheld in Turner Elkhorn.

16/ See Lesher affidavit at 16. See also Mootz deposition at 220-222, attached as Exhibit H to the Schwartzbauer affidavit. For example, one such road material was a product called "dust layer," which was a road tar sprayed on unpaved streets in the summer to keep dust down. This material would wash off the streets and would be replaced at least yearly. See Mootz deposition at 220-222.

but who themselves used Reilly products in ways which have probably affected the environment, and who are no longer customers, now seek to hold Reilly retroactively liable under CERCLA, justifying that as simply an economic adjustment and cost spreading device. The arbitrary nature of such an application of liability is transparent indeed.

Yet another factor which renders unconstitutional the retroactive application of CERCLA liability to Reilly is the extent to which Reilly may be held liable for harm caused by anything other than its own conduct. It has been held that liability under CERCLA is joint and several, and that, for such liability to attach, it need not be shown that the party sought to be charged actually caused the damage said to be occurring. See SCRDI.[17/] In Turner Elkhorn, however, the Court observed that, to the extent that damage is due to causes other than the conduct of the party sought to be charged, holding that party retroactively liable for such charges poses constitutional difficulties. See 428 U.S. at 24-5.[18/] Causation is an

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17/ Reilly does not agree that these standards are correct, and the Court is not being asked by any party to rule on them here. Reilly does contend, however, that if they are adopted as being required under CERCLA, then retroactive liability utilizing them is constitutionally infirm on that basis as well.

18/ In Turner Elkhorn, it was clear that no mine operator would become liable for deaths or disabilities not attributable to his own conduct. See, e.g., 428 U.S. at 19-20, 22 n.21, 24-25. Indeed, the Court went so far as to construe the statute to avoid application to mine operators of a certain

essential condition for the retroactive imposition of liability. Id. See also Railroad Retirement Board v. Alton Railroad Co., supra, 295 U.S. at 350 (invalidating legislation imposing liability based on "transactions with which [those liable] were never connected"). Here, if this Court were in the future to agree with the SCRDI court's interpretation, to the extent Reilly could be charged under a theory of joint and several liability with liability for contamination in fact caused by third parties, or for contamination the extent of which was due to parties other than Reilly, then imposition of retroactive liability would be unconstitutional for this reason as well.

As indicated in the affidavit of John C. Craun, this is a case where the water contamination in St. Louis Park is the result of multiple sources. To the extent that Reilly is able to recover by joining an identifiable third party defendant, the harshness of the rule is at least mitigated. However, many sources will never be identified, and others may not be financially responsible. As this Court is aware, Reilly's attempts to discover the facts concerning third

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16/ (Footnote Continued)

evidentiary restriction which the district court in that case had found unconstitutional because, if applicable, it would have "preclude[d] an operator's defense that the disease did not arise out of employment in the particular mines for which it was responsible. . . ." 428 U.S. at 35; cf. id. at 13.

parties are presently continuing. Although there is common law support for the notion that a negligent defendant, or one who has unreasonably caused a nuisance, may be jointly and severally liable if the damages cannot be apportioned, see Johnson v. Fairmont, 188 Minn. 451, 247 N.W.572 (1933) and Sloggy v. Dilworth, 38 Minn. 179, 185, 36 N.W. 451 (1888), under CERCLA, Reilly would be retroactively liable under the current interpretation of the statute even for non-negligent and completely reasonable actions and even for contamination which it did not cause.

Importantly, Reilly's Due Process defense is asserted not only against imposition of liability under CERCLA in general, but as applied to Reilly in this case. Evaluation of that defense necessarily includes an assessment of just what the United States and the State are seeking to hold Reilly liable for, i.e., the relief sought. This is important not only in terms of assessing the harsh and oppressive consequences of liability on Reilly, but also in terms of evaluating the importance of the governmental interest involved here.

At this time, however, the facts necessary to a determination of these matters are not fully available, which Reilly submits is an additional reason why summary judgment is inappropriate on this defense. The plaintiffs have not submitted a remedial action plan, nor have they yet identified

all the damages for which they may seek to hold Reilly liable under their prayers for relief. See Schwartzbauer affidavit at ¶2. Reilly submits, for example, that, to the extent it may be asked to pay for a clean up that includes any contaminants not associated with the operation of its former plant, it would be unconstitutional to require it to do so on the basis of retroactive liability. But the nature of the clean up that will be requested and the extent and nature of the contamination actually involved therein are not yet fully known. Accordingly, the degree of harm which Reilly may suffer as a result of the retroactive imposition of liability cannot as yet be fully assessed. See Schwartzbauer affidavit at ¶2.

Just as importantly, the extent of the governmental interest involved in holding Reilly retroactively liable here cannot be properly judged until the plaintiffs have decided on a remedy and, Reilly submits, until the fact determination has been made that that remedy is both a reasonable and necessary one. See e.g., United States Trust Co. v. New Jersey, supra, 431 U.S. at 25, 29. The government "is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." Id. at 31. See also Garris v. Hanover Insurance Co., 630 F.2d 1001, 1004 (4th Cir. 1980). It is not enough simply to say that there is a governmental interest in protecting against the harmful effects of any contamination that may be associated with the Reilly

site. On the basis of studies conducted to date and made public last May, Reilly has concluded that, in fact, very little in the way of a remedy is required to alleviate even the alleged harmful effects. See Schwartzbauer affidavit and excerpts from the Report of Environmental Research and Technology, Inc. attached thereto.

Moreover, whether there are any harmful effects that need to be remedied -- an issue obviously bearing on the necessity and reasonableness of any remedy sought -- is an issue which Reilly -- and much of the scientific community -- has contested all along, and which probably will only be resolved by the trier of fact at trial. See Schwartzbauer affidavit at ¶3 and previous discussion. Reilly submits that no proper balancing of the governmental interest involved and the harsh and oppressive nature of the retroactive application of CERCLA to Reilly under the facts of this case can be made until all those facts are known. That cannot occur until trial on the merits.[19/] Accordingly, summary judgment now cannot properly be granted.

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19/ Although the above discussion illustrates some of the reasons why it would be premature to decide the motion for summary judgment at this stage in the proceedings, Reilly respectfully refers the Court to the affidavit of Edward J. Schwartzbauer (especially paragraphs 1-15 thereof), submitted partially under the provision of Fed. R. Civ. P. 56(f), for a further discussion of significant aspects thereof.

## CONCLUSION

The evidence in this case will show that the Reilly conduct complained of in this case occurred long before the enactment of CERCLA, long before the enactment and adoption of regulations and criteria which the plaintiffs seek to enforce in this case, and long before science had achieved a state-of-the-art which could have detected the environmental violations here alleged. Reilly's actions were all accomplished in the light of day, with the full knowledge and acquiescence of responsible governmental authorities. For all of the reasons set forth in this memorandum and the accompanying affidavits, the motion for partial summary judgment of the United States and the State regarding Reilly's defense to their complaints based on the unconstitutionality of CERCLA should be denied.

Dated: March 23, 1984

Respectfully submitted,

DORSEY & WHITNEY

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